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NEVER TOO LATE—THE WORK OF THE TRANSITIONAL JUSTICE COMMISSION IN TAIWAN

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The fact that Taiwan set up an institution solely dedicated to transitional justice only thirty years after the country's democratization has made Taiwan's transitional justice experience unique among newly democratized states. How and when transitional justice is approached and upheld will affect a country's stance toward its dark history and even re-make its democracy. Taiwan is currently heralding a new experience that is determining for Taiwan's democratic future and that could serve as a valuable reference for other countries that are to go through or are in the middle of democratization.

I. INTRODUCTION

In the years when Taiwan's authoritarian rule was coming to an end, political victims and civic organizations started to demand that the government face up to its past wrongs and redress historical injustices. Before 2016, there was no shortage of apologies made by the president (of both major parties when they held the executive branch) and compensations offered to political victims and their families in response to their demands. However, legislation addressing past human rights violations passed before 2016 was limited in scope and conservative in language, as Caldwell rightly argues,¹ while cases of political persecution were said to be caused by misjudgments or flaws in the administrative process, rather than the systematic product of a repressive state. In 2017, after the Democratic Progressive Party (DPP) won both the presidency and the legislature for the first time in Taiwan's democratic history in 2016, the Act on Promoting Transitional Justice (hereafter, Transitional Justice Act) cleared the floor in the Legislative Yuan.

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¹ See Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and During the Tsai Administration*, 27 WASH. INT'L L.J. 465–67 (2018).

Caldwell characterized Taiwan's transitional justice as having developed in two phases, with the first period running from 1987 to 2016 and the second starting from the DPP's securing of both the presidency and the legislative majority in 2016.² Due to time constraints, he was not able to take his observations further and said it remained to be seen how the Transitional Justice Commission ("TJC" or "the Commission"), established in accordance with the Transitional Justice Act in May 2018, would work to fill the "gaps of knowledge and accountability" left unfilled and unresolved from the first phase.³ The aim of this article is to answer this question, which has also been raised by the victims, Taiwanese society, and international human rights academics. The main tasks of the TJC will be laid out, followed by a presentation of the approach that the TJC has taken for the redressing of past judicial wrongs, one of the key indicators of the progress of Taiwan's transitional justice.

II. THE TRANSITIONAL JUSTICE COMMISSION

The work of transitional justice was dispersed among various government agencies before the establishment of the TJC. The National Human Rights Museum, which is founded upon and transformed from former White Terror prison compounds in Jingmei, New Taipei City, and on Green Island, Taitung County, is administered by the Ministry of Culture, while the National Development Council is the agency that supervises the collection and management of the political archives. The National Human Rights Museum and the National Development Council are both third-tier government bodies. Overseeing the maintenance of statues of Chiang Kai-shek that abound around the island, on the other hand, falls under the authority of either municipal governments or schools.

On the compensation offered to victims, both February 28 Incident victims and White Terror victims have been financially compensated by the government. Taiwan has already issued a total of more than 26 billion NT dollars (840 million U.S. dollars) of compensation to its political victims. Notwithstanding this achievement, the demand for truth and ending impunity had nevertheless gone unanswered. Corresponding agencies for the planning and execution of tasks such as redressing past judicial injustice and holding perpetrators accountable had been non-existent before the TJC. The imperative work of transitional justice, including excavating and restoring

² *Id.* at 451–52.

³ *Id.* at 480–83.

historical truth, reinstituting justice, and compensating the victims, had been lacking in systematicity and consistency, which was why the TJC had to be established.

The TJC is an independent, second-tier government agency overseen by the Executive Yuan, consisting of nine commission members, five of whom are full-time while the rest are part-time. The commission members, as stipulated by the Transitional Justice Act, are nominated by the Premier and subject to legislative review and confirmation. The commission includes a maximum of three members from the same political party and no fewer than three members from each gender. With its nominees confirmed in May 2018, the TJC was officially founded at the end of the same month, with a semiannual budget of 1.7 million U.S. dollars (from June to December 2018) and a staff of about seventy people. Within two years, the Transitional Justice Act stipulates, the TJC shall “submit a hardcopy mission conclusion report to the Premier” regarding the tasks it has been assigned.⁴ “If the Commission is unable to complete its work within two years, it may report to the Premier and request an extension; each extension shall be no longer than one year,” the law states.⁵

As an independent administrative institution, “the TJC shall exercise its authorities of office independently in accordance with the law” and its members “shall exercise their authorities of office in an independent and non-partisan manner, and shall not take part in the activities of any political party during their terms,” according to the Transitional Justice Act.⁶ In practice, there are currently two commission members with DPP party membership in the commission. Furthermore, the fact that the commission is a second-level government agency has guaranteed a considerable amount of power for the commission to coordinate between government agencies of different levels and to hold a comprehensive view of its plan.

The TJC consists of four departments for the end of accomplishing the tasks assigned by the provisions of the Transitional Justice Act. First, the Department of Historical Truth Restoration is tasked to investigate, on the basis of the political archives and statements made by concerned parties, the repressive institutions consolidated by the Temporary Provisions Effective

⁴ See Cujin Zhuanxing Zhengyi Tiaolo (促進轉型正義條例) [Act on Promoting Transitional Justice], art. 11 (Dec. 27, 2017), <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCODE=A0030296>.

⁵ *Id.*

⁶ *Id.* art. 12.

During the Period of Communist Rebellion and the human rights violations committed under them. The results of the investigations will help the commission determine the source of human rights abuses, identify the perpetrators and participants in the oppression mechanisms and thereby assign accountability. The department is also to establish a database by integrating resources from existing archives of past court-martial trials, in which the perpetrators and those who had been involved in the repression and how human rights were violated will be made public. The database, when completed, will provide in-depth and insightful information on Taiwan's past authoritarian model.

The Department of Authoritarian Relics Handling, the second department, is tasked with inspecting the number and locations of the statues or memorials commemorating authoritarian rulers Chiang Kai-shek and Chiang Ching-kuo. The department will explain to the public why the commemoration contradicts the democratic constitutional order and work to remove the authoritarian symbols on the basis of social consensus. Locating historical sites where victims used to be imprisoned, detained, tortured, and interrogated is also one of the department's missions. The TJC will later determine whether the sites are to be turned into memorials or tourist spots incorporating local culture. Handling authoritarian relics, which includes erasing symbols that are nostalgic or in memorial of the authoritarian ruler(s) in public buildings and spaces and preserving the sites of past injustice for educational purposes, will prevent and caution the future generations against the rise and return of authoritarianism.

The third department, the Department of Redressing Past Judicial Wrongs, is to dissolve the legality of the past authoritarian rule and to reinstate the victims' reputation. The department reviews the political verdicts to identify the victims before expunging their records of punishment and confiscation and making an official and public announcement of the expungement. The department is able to do so because the victims' convictions have been annulled since December 27, 2018, the date on which Transitional Justice Act was promulgated. The legislative revocation (of convictions) and how confiscated properties could be returned or compensated will be further discussed in the next section where Taiwan's approach to redressing past judicial wrongs is explained. The department is also trying to formulate a mechanism for the purification of the personnel system, also known as lustration law in Eastern Europe, and setting up a

method for the restitution of properties illegally acquired by the government, individuals, or institutions during the period of authoritarian rule.

The Department of Rebuilding Social Trust works on addressing psychological traumas and also on planning the use of the ill-gotten party assets to promote and assist in transitional justice, human rights education, long-term care and other social welfare policies, and other transitional justice-related cultural projects. The department has also started to train voluntary counseling psychologists to help the TJC deal with the psychological traumas caused by past political violence.

The two-year term TJC, at the end of its mission, will publish a final report, on the basis of the work of the four departments—namely, collected statements, investigative findings, archival materials, and the commission's efforts made to prevent the rise of authoritarian nostalgia and address psychological traumas caused by past political violence. The final report will reveal how human rights were violated during the February 28 Incident and the White Terror Period by the repressive institutions for the “mobilization for the suppression of the communist rebellion” and under martial law.

Redressing judicial wrongs is one of the most important among the TJC's various tasks. However, of all the authoritarian legacies in Taiwan that remain to be dealt with, judicial wrongs have been one of, and perhaps even the most, thorny authoritarian leftovers when efforts were made to settle them within the bureaucracy. One of the main characteristics of Taiwan's authoritarian rule was systematic human rights violations through military trials; on the face of it, the military trials were conducted in accordance with the “law,” but the legitimacy of the laws and the judgments has since been called into question by today's standard.

III. REDRESSING THE JUDICIAL WRONGS

The lifting of martial law in 1987 has often been regarded as the beginning of Taiwan's democratization process, followed by the abolition of the Temporary Provisions Effective During the Period of Communist Rebellion in 1991 and the amendment to Article 100 of the Criminal Code (which criminalized seditious “intentions”) in 1992. Since then, subversive intentions and speech could no longer be criminally punished, which signified the dawn of a new democratic period.

However, following these moves, the then-ruling Kuomintang (“KMT”) government failed to initiate the transitional justice project as other new democracies had done. Not only did it fail to do so, the KMT government further took advantage of its remaining authority to pass the National Security Act as “supporting measures” to the lifting of martial law that effectively precluded civilians tried under martial law from appealing their convictions in civil court in the post-martial law period, which is a right guaranteed by the Martial Law Act.

Legal scholar Tay-Sheng Wang argued that passing the National Security Act reflected “the KMT government’s full respect for the formal legality of the courts-martial trials, which sanctioned state inaction regarding possible past injustice, and its explicit denial of transitional justice.”⁷ The constitutionality of the legislation was later further confirmed by the Constitutional Court in Judicial Yuan Interpretation No. 272 in 1991, citing “the maintaining of stability and consistency of the judicial process and of the social order” as imperative and thereby, Wang argued, “tacitly validated and legitimated the human rights abuses perpetrated by the KMT officials during the martial law period.”⁸

The interpretation had two following implications. First, by upholding the importance of “the maintaining of stability and consistency of the judicial process and of the social order,” the Court’s interpretation placed a major barrier to the victims’ recourse to justice. Second, as those cases cannot be appealed in civil court for reconsideration in the post-democratization time, investigating the legality (or the absence of it) of the court-martial trials was practically out of the question.

The Transitional Justice Act was passed by the legislature at the end of 2017. Article 6 of the act directly addresses the redressing of past judicial wrongs and upends the conservative mentality and measures depicted in the preceding paragraphs.

Article 6(3) of the Transitional Justice Act stipulates that those victims who have been compensated or have had their rights re-instituted in accordance with the February 28 Incident Disposition and Compensation Act (1995), the Compensation Act for Wrongful Trials on Charges of Sedition and

⁷ See Tay-Sheng Wang, *Transitional Justice in Taiwan: A Dialogue among the Past, the Present and the Future*, 315 TAIWAN L.J. 1 (2017).

⁸ See Judicial Yuan [J.Y.] Interpretation No. 272, DAFAGUAN JIESHI [JIESHI] (Const. Ct. Jan. 18, 1980), https://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=272; Caldwell, *supra* note 1, at 462.

Espionage during the Martial Law Period (1998), and the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law (1995/2000), shall see the related convictions voided and their criminal records expunged from the date on which the Act entered into force (December 27, 2017). And for those who did not meet the above descriptions, including those who had been ruled guilty of taking part in subversive activities and therefore denied compensation, the TJC—acting *ex officio* or upon application by the concerned party—will be able to review their criminal convictions, which, if determined to be judicial wrongs, are also to be annulled and expunged from the record. As to how the confiscated properties are to be returned to the victims following the expunging of the record of confiscation, the TJC is now estimating the amount and value and sorting out the categories (e.g., lots of land, buildings, or cash) of the properties confiscated. Regular meetings with experts and professionals are conducted to discuss possible future measures.

There are reasons why the Transitional Justice Act, legislated only thirty years after democratization, has chosen to remedy the judicial injustice by means of direct legislative revocation instead of going through the judicial system for re-trials. As the country's political victims are dying off, the judicial process initiated by individual victims, which might drag on for years, would be an impractical approach for the septuagenarians and octogenarians to attain their rightful justice. Also, for historical cases like these, the preservation and acquisition of intact evidence is unlikely, a fact that might not facilitate the victims' winning the case in court even if they appeal. Finally, transitional justice has never been carried out in Taiwan's judicial system, which has not been reformed since the authoritarian period. As the court is itself a target of the transitional justice project, it is doubtful that it would be able to shoulder the arduous task and political responsibility of re-interpreting the legal order.⁹

Since the establishment of the TJC on May 31, 2018, the Commission has invested considerable resources in order to restore the justice of the victims as fast as possible. After reviewing and conducting a comparative check on the documents from various government agencies, the TJC announced on October 5, 2018, the first list of a total of 1,270 victims whose convictions were to be revoked. The list was published in the official Executive Yuan Gazette and on the official website of the TJC.

⁹ Wang, *supra* note 7.

The TJC also held a grand announcement ceremony for announcing the list on the same day. The ceremony was held in the five-star Sheraton Grand Taipei Hotel in Taipei, where the most notorious detention center in the 1950s used to sit. More than 200 political victims and their families were present at the ceremony, the most senior of whom is 98 years old, a survivor of and partaker in the February 28 Uprising in 1947. President Tsai Ing-wen, along with Premier Lai Ching-deok of the Executive Yuan, Legislative Speaker Su Chia-chyuan, and Control Yuan President Chang Po-ya, attended the ceremony.

Three representatives of the victims making remarks during the ceremony stressed that the TJC's task of annulling their convictions was "immensely meaningful" for them. President Tsai Ing-wen again apologized to the victims at the ceremony, acknowledging that the revocation came too late for all of the victims to see their convictions voided.

However, concerning the said progress made by the TJC, two subsequent issues are worthy of our attention. The first is the cost of opting for legislative revocation of the convictions: skipping the judicial process that entails re-investigation is simple and fast, but the price is that truth is then hard to come by. The other difficulty is the question of how the TJC investigates those cases that had failed to receive compensation or reinstitution of rights, and at the same time establishes the legitimacy and authority of its decisions.

The risk of sacrificing the truth for early justice, in the absence of other means within the existing system, could be offset and compensated by making more political archives public—another of TJC's major tasks—and encouraging more research into them. As for the second difficulty, while the TJC is far from on a par with the court in terms of legal expertise and procedural soundness, it has convened a review team consisting of professionals from academia and the field of legal practice to conduct the necessary investigations. The TJC is expecting that the legal professionals will substantiate the decisions made by the Commission with solid arguments to enhance their legitimacy.

The work of redressing past judicial wrongs, we believe, would help wean Taiwan from the tendency to infringe upon human rights in the name of state security. In a time when the world is witnessing serious democratic

backsliding, Taiwan's hard-earned democracy can be a valuable example and model.

IV. CONCLUSION

Taiwan's stable and vibrant democracy is unique in Asia. How its transitional justice effort has transitioned and developed from the early post-democratization period to what it is now might also provide a unique perspective to the existing related research and practice.

For Taiwan (and possibly many other Asian countries as well), the terminology of "transitional justice" might have been imported, but the concept of compensating the victims and disclosing historical truth, among various other related objectives, in order to redress the past wrongs, is native and has long been promoted by the Taiwanese civil society and victim groups since as early as the 1990s, when the country was just embarking on the democratization process.

Today, with the support from society, the TJC has been established to carry out the work of transitional justice more systematically, such as redressing past judicial wrongs and assigning responsibility and accountability for human rights violations. Although with the current approach, the challenges and difficulties described earlier might arise, we are confident in our ability to learn lessons from other countries' precedents, and expect that our experience could also be an example for other societies with Chinese culture background or newly democratized states in the future. We believe that this is the best gift that a small country like Taiwan can offer to the democratic world.

